

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 10-0029

FILED

AUG 03 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

PEGGY L. STEVENS,

Plaintiff, Cross-Appellant and Appellee,

v.

ORDER

NOVARTIS PHARMACEUTICALS
CORPORATION,

Defendant and Appellant.

Appellee Peggy L. Stevens has filed a motion to strike a portion of the reply brief filed by Appellant Novartis Pharmaceuticals Corporation (NPC) on the ground that NPC “raises a new issue and argument not included in its opening brief.” Alternatively, Stevens requests leave to file a response to NPC’s argument in her Cross Appellant’s reply brief. NPC has filed objections to the motion.

In its opening brief, NPC raised the issue of the District Court’s denial of its motion to dismiss under the statute of limitations. It argues therein that Stevens’ claim does not relate back within the limitation period pursuant to the “fictitious name” statute. In her answer brief, Stevens rebuts NPC’s relation back argument but also argues that the statute of limitations was tolled. In its reply brief, NPC rebuts Stevens’ tolling argument. Thus, Stevens argues that NPC has improperly addressed tolling in its reply brief because it did not discuss this issue in its opening brief, citing *In re Estate of Bovey*, 2006 MT 46, ¶ 11, 331 Mont. 254, 132 P.3d 510, for the principle that the Court “will not address the merits of an issue presented for the first time in a reply brief.”

However, *Bovey*’s statement was made in conjunction with the appellate rule, now M. R. App. P. 12(3), governing the content of reply briefs. The full quote states, “Rule 23(c),

M. R. App. P. provides that an appellant's reply brief must be confined to new matter raised in the respondent's [now, appellee's] brief; thus, an appellant may not raise new issues in a reply brief. We will not address the merits of an issue presented for the first time in a reply brief." *Bovey*, ¶ 11.

Here, the tolling issue was raised in Stevens' answer brief to oppose NPC's issue that her claim was barred by the statute of limitations. It was thus appropriate for NPC to respond to this "new matter" in Stevens' brief. M. R. App. P. 12(3). Although Stevens complains that NPC "saved its entire class action tolling argument for its reply brief, where the largest portion of its brief was spent addressing that issue," this may have been merely a tactical decision on the part of NPC. Indeed, had Stevens not raised the tolling issue in her answer brief, NPC may well have been prohibited from addressing the issue at all in reply. The appellate rules do not provide an opportunity for Stevens to file an additional argument in sur-reply to NPC's reply.


Stevens asks, if her motion is denied, that she be permitted to file a substitute Cross Appellant's reply brief eliminating her sur-reply arguments to NPC's argument which she included within her already-filed Cross Appellant's reply brief. That request would be appropriate so that the briefs before the Court do not contain extraneous material. Therefore,

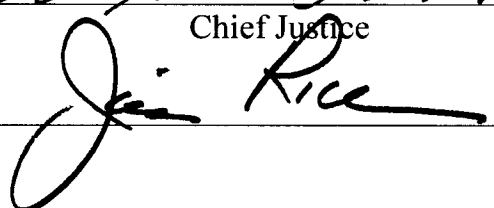
IT IS HEREBY ORDERED that the motion to strike is DENIED.

IT IS FURTHER ORDERED that the request to file a substitute Cross Appellant's reply brief is GRANTED.

The Clerk is directed to mail a true copy of this Order to counsel of record.

DATED this 3rd day of August, 2010.



Chief Justice


Patricia Cotten
Brian M. Muri
Justice